Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-236

CALVIN T. SHERARD,
Petitioner,
v.
R. B. SHELTON, Director,
WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES.
ON BEHALF OF: BETTYE J. SHERARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

Respondent does not question petitioner's statement of the opinion of the court below but takes exception to petitioner's statement that the judgment of the trial court was without a hearing.

JURISDICTION

From the hereinafter contained "Statement of Facts" respondent asserts that no federal issue is herein involved. The determinations of the state appellate courts

were based solely on state appellate procedure. Basis for jurisdiction stated in the petition under 28 USC §1257 (3) does not lie, there being no federal question involved.

QUESTION PRESENTED

Petitioner misstates the nature of the legal issue sought to be reviewed. The only issue ruled on by the state appellate court was: "Does petitioner have an appeal as a matter of right from a trial court order modifying a prior order of support?"

CONSTITUTIONAL ISSUE INVOLVED

Respondent asserts that no constitutional issue is involved.

STATEMENT OF FACTS

Petitioner seeks review of a denial of an attempted appeal to the Michigan appellate courts involving an alleged denial of due process. The initial case was begun by the respondent herein, under the Michigan Family Support Act (MCLA 552.451-9), in April 1974. After service of Complaint and Summons and at a trial court hearing on September 14, 1974 a Judgment or Order for Support was entered. This being a "final judgment or order" under Michigan court rule, an appeal as a matter of right may have been taken[1] within twenty days[2] of September 14, 1974. No appeal was taken from this order. Subsequently, on two separate occasions, petitioner was brought before the trial court and held in contempt for failure to comply with said support order of

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[1] GCR 1963, 806.1 (Appendix CC)

[2] GCR 1963, 803.1 (Appendix CC)

September 14, 1974 and put on probation (see respondent's Appendix "AA", Order of Contempt, January 7, 1975; Appendix "BB", Order of Contempt, March 14, 1975). No appeals were taken from these contempt orders. Later, the petitioner sought modification of the September 14, 1974 support order. As a result of his petition an order modifying the support order was entered July 18, 1975. Petitioner filed a claim of appeal as of right from this modification order of July 18, 1975. At this time, for the first time, petitioner raised as an issue the alleged denial of due process at the time the September 14, 1974 order was entered. This attempted appeal was denied on motion by the Michigan Court of Appeals. The court ruled that it did not have jurisdiction to hear an appeal from an order modifying a support order as a matter of right. In so denying petitioner's claim of appeal as of right, the court did so without prejudice and advised him of the proper procedure for filing an application for leave to appeal.

ARGUMENT

Respondent asserts that no federal question is presented to this court, therefore the Petition for Writ of Certiorari must be denied.

The issue now raised by the petitioner, an alleged denial of due process, was not properly submitted nor passed upon by the Michigan appellate courts. The sole basis for the denial of petitioner's attempted appeal was one of state appellate procedure under the Michigan court rules. The Michigan Court of Appeals ruled that the petitioner's claim of appeal as of right could not be taken from a modification order under GCR 1963, 806.1. The proper steps for an application for leave to appeal were set forth by the court in its order (Petitioner's Appendix

A). No federal issue was involved in such determination. The jurisdiction of the United States Supreme Court to review the decisions of a state court is not that of a general reviewing of a court in error, but is limited to the specific instances of a denial of federal rights. *Waters-Pierce Oil Co v Texas*, 212 US 86, 97; 29 S Ct 220; 53 L Ed 417, 424 (1908). The Supreme Court is always wary of assuming jurisdiction of a state court unless it is plain that a federal question is necessarily presented. It has jurisdiction to review a state court decision on certiorari only if a federal ground was the sole basis for the decision. *Department of Mental Hygiene of California* v *Kirchner*, 380 US 194, 85 S Ct 871; 13 L Ed 2d 753 (1965). The court does not have jurisdiction even where a federal question exists, where a state ground also exists and such is independent of the federal grounds and adequate to support the judgment. *Jankovich* v *Indiana Toll Road Commission*, 379 US 487, 85 S Ct 493; 13 L Ed 2d 439 (1965). This rule applies not only to state substantive grounds, but also to procedural grounds. *Henry* v *State of Mississippi*, 379 US 443, 85 S Ct 564; 13 L Ed 2d 408 (1965) (reh denied 380 US 962, mot den 381 US 908).

In the present case, the requirements of the court rule on which the state courts based their orders (GCR 1963, 806.1) are not mere "technicalities", but rather involve basic procedure and organization of the Michigan appellate courts, necessary for efficient administration of justice. Furthermore, petitioner's attempted appeal was dismissed without prejudice to his filing application for leave to appeal in this matter. Additionally the appellate court informed the petitioner of the proper procedure for making application for leave to appeal under Michigan court rule.

CONCLUSION

The decisions of the Michigan appellate courts involved no federal questions. Jurisdiction for review by the United States Supreme Court under 28 USC §1257(3) is not present. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX AA

ORDER FOR PROBATION

Wayne County Circuit Court

No. 74-011-235-DS

It appearing to the Court that the above named respondent was duly served with an order to show cause and did appear in this Court on January 3, 1975, and it further appearing to the Court that the said respondent has failed and neglected to comply with the corrected order of this Court providing for the payment of support and has failed to purge himself of the contempt charged in said petition.

It is therefore Ordered and adjudged that the above named respondent Calvin Sherard be and he is hereby adjudged guilty of contempt of court.

It is further Ordered that the above named respondent be placed on probation to the Friend of the Court for the period of one (1) year, and during such period of probation the above named respondent Calvin Sherard shall pay the sum of Forty-Five ($45.00) Dollars per week to the Friend of the Court.

Act 138, P.A. 1966 Family Support Act.

/s/ JAMES MONTANTE
Circuit Judge

APPENDIX BB

ORDER FOR PROBATION

(Wayne County Circuit Court)

No. 74-011-235-DS

Present, the Honorable Myron H. Wahls.

It appearing to the Court that the above named respondent was duly served with an order to show cause and did appear in this Court on March 14, 1975, and it further appearing to the Court that the said respondent has failed and neglected to comply with the order of this Court providing for the payment of support and has failed to purge himself of the contempt charged in said petition.

It is therefore Ordered and adjudged that the above named respondent Calvin Sherard be and he is hereby adjudged guilty of contempt of court.

It is further Ordered that the above named respondent be placed on probation to the Friend of the Court for the period of one (1) year, and during such period of probation the above named respondent Calvin Sherard shall pay the sum of Fifty ($50.00) Dollars per week to the Friend of the Court.

Act 138, P.A. 1966, Family Support Act

/s/ MYRON H. WAHLS
Circuit Judge

APPENDIX CC

MICHIGAN GENERAL COURT RULES

Rule 803 Time for Taking Appeal.

1. Appeal as of Right. Appeal to the Court of Appeals as of right in civil cases shall be taken not later than 20 days after the entry of the judgment or order appealed from, or within 20 days after the entry of an order denying a motion for a new trial or rehearing, provided such motion is made and served (a) within 20 days after the entry of the judgment or order appealed from, or (b) with such further time as may be allowed by the trial court during such 20 day period. In criminal proceedings, appeal as of right shall be taken not later than 60 days after the entry of the judgment or order appealed from or after the entry of an order appointing appellate counsel for an indigent defendant pursuant to sub-rule 785.4 (1), or within 60 days after the entry of any order denying a motion for new trial, provided such motion is made and served (a) within 60 days after the entry of judgment or order appealed from, or (b) within such further time as may be allowed by the trial court during such 60-day period. The time herein provided is jurisdictional in appeals as of right.

2. Appeal Upon Leave. An appeal upon leave shall be deemed to be taken by filing of claim of appeal and paying the fees required by sub-rule 803.5 within 20 days after notice of entry of order allowing appeal has been mailed to counsel by the clerk of the Court of Appeals.

Rule 806 Appeals by Right and by Leave.

1. Appeal as of Right. In all criminal and civil matters, an aggrieved party shall have a right to appeal from all final judgments or final orders from the Circuit

Courts, Court of Claims and Recorder's Court, except judgments on ordinance violations in the Traffic and Ordinance Division of Recorder's Court. Appeals from final judgments from all other courts and from convictions for ordinance violations in the Traffic and Ordinance Division of the Recorder's Court shall be taken to the Circuit Courts, upon which further review may be had only upon application for leave to appeal granted by the Court of Appeals. Final judgment or interlocutory orders of courts which by law are appealable to the Circuit Court only upon leave or on appeal are to be tried de novo in the Circuit Court shall continue to be tried in the Circuit Court. See sub-rule 701.1. Appeals from final or interlocutory judgments of the District Court, Common Pleas Court, or judgments in ordinance cases in the Traffic and Ordinance Division of Recorder's Court shall be taken to the Circuit Court in which such court is located. Appeals as of right shall be taken in accordance with and within the time prescribed by these rules.

2. Appeal by Leave. The Court of Appeals may grant leave to appeal from:

(1) Final or interlocutory judgments or orders of administrative agencies or tribunals which by law are appealable to the Court of Appeals or the Supreme Court.

(2) Any judgment, order, act or failure to act by the Circuit Courts, Court of Claims, and Recorder's Court, except on ordinance violations in the Traffic and Ordinance Division of Recorder's Court, which is not a final judgment appealable as of right.

(3) Orders in domestic relations cases for temporary alimony, payment of expenses, or support or custody of minors entered prior to final judgment shall be deemed interlocutory in nature and appealable by leave.

(4) Final judgments entered by the circuit court on appeals from any other courts.

(5) Such other matters as are provided by the rules of the Supreme Court or other laws.

In no event shall leave to appeal be granted later than 18 months from the entry of the order or judgment appealed from in any civil matter.